

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,

Case No. 13-CR-0035(1) (PJS/SER)

Case No. 17-CV-5481 (PJS)

Plaintiff,

v.

ORDER

JEFFREY ALLEN GARDNER,

Defendant.

Defendant Jeffrey Gardner is serving a sentence of 90 months in prison after being convicted by a jury of fraud and other charges. On October 4, 2018, the Court denied Gardner's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence and entered judgment the same day. ECF Nos. 313, 314. Gardner did not file a timely notice of appeal.¹ *See* Fed. R. App. P. 4(a)(1)(B) (granting 60 days to file a notice of appeal in a civil case in which the United States is a party).

Gardner has now filed a motion for leave to appeal out of time. ECF No. 315. Gardner cites Fed. R. Civ. P. 60(b), which gives courts the power to grant relief from judgment under certain circumstances. Gardner is not seeking relief from judgment, however; he is seeking to enlarge the time for him to file a notice of appeal. The Court's ability to grant such relief is governed by Fed. R. App. P. 4.

¹Gardner contends that he prepared a timely notice of appeal and sent it to his daughter, who sent it to the Court. The Court never received any such notice.

The time to appeal the disposition of a § 2255 motion is governed by Rule 4(a) of the Federal Rules of Appellate Procedure. *See Wiggins v. United States*, 900 F.3d 618, 621 (8th Cir. 2018) (applying time limits under Fed. R. App. P. 4(a)(1)(B) to appealing a ruling on a § 2255 motion); *Ackerland v. United States*, 633 F.3d 698, 701 (8th Cir. 2011) (same). This means that Gardner had until December 3, 2018, to file a notice of appeal.

Under certain circumstances, the Court may extend or reopen this deadline, but none of those circumstances exist in this case. It is too late for the Court to extend the deadline under Fed. R. App. P. 4(a)(5); Gardner would have had to file his motion on or before January 2 to seek such relief, but he did not place his current motion in the mail until January 17. ECF No. 315-2. Under Fed. R. App. P. 4(a)(6), the Court may reopen the time to file a notice of appeal, but only if, among other things: (1) the moving party did not, within 21 days after the entry of judgment, receive notice of that entry under Fed. R. Civ. P. 77(d); and (2) the motion to reopen is filed within 14 days after the moving party received the proper notice (or within 180 days of the entry of judgment, whichever is earlier). Gardner does not state when he received notice of the entry of judgment, but he clearly received notice several months ago; he prepared a notice of appeal in November. ECF No. 315-1 at 1. His current motion is therefore untimely and, as a result, the Court lacks the power to reopen the time to file a notice of appeal.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein,
IT IS HEREBY ORDERED THAT defendant Jeffrey Gardner's motion for leave to appeal
out of time [ECF No. 315] is DENIED.

Dated: January 29, 2019

s/Patrick J. Schiltz

Patrick J. Schiltz

United States District Judge